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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 759

FRANK E. MAESTAS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. .....

FRANK E. MAESTAS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 30, 1962.

CITATION TO OPINION BELOW

The opinion and dissent of the Circuit Court of Appeals is unreported and is printed in Appendix B hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 30, 1962; Appendix C. A timely motion for rehearing *en banc* and rehearing was denied on December 21, 1962; Appendix C. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Whether a conviction under 21 U.S.C. §174, absent physical possession, may be based on the possession of co-defendant who is not a co-conspirator or an aider and abettor?

CONSTITUTION INVOLVED

Amendment V:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

STATUTES INVOLVED

The statutory provisions involved are 70 Stat. 570, 21 U.S.C. 1958 ed., §174 and 65 Stat. 717, 18 U.S.C. 1958 ed., §2. They are printed in Appendix A, *infra*, p. 9.

STATEMENT

Wolski, an employee of the Bureau of Narcotics and the key government witness, testified to a meeting with one Lucero and petitioner on March 22, 1961, in Murphy's Tavern at Colorado Springs. (R. 15) In addition one Cappy Muniz, an informer, was present and seated at the

same booth. The record can best summarize this encounter upon which the Circuit Court relied to uphold petitioner's conviction.

> "Q. After they sat down, what happened? A. We had a conversation relating to clothing first, particularly sport coats. Then we talked of a feminine nature, eventually bringing the conversation to the topic of my desire to obtain some heroin.
>
> Q. All right, sir, who introduced you to the parties? A. Mr. Muniz introduced me to the two gentlemen. Q. Now, you stated that when you came down to the purpose of your conversation; would you please tell us who that conversation was with and between? A. My conversation started with Mr. Maestas, who was sitting across from me and I asked him how much a half ounce of heroin would cost me. He said $250. I asked him the quality and he told me that this heroin could be cut down the middle. Cutting down the middle means to double it. I took out $300 out of my pocket, counted out $250, putting the remaining $50 back in my pocket and asked Mr. Maestas if the deal was to go down here in the booth. He says, 'No, not here,' and he turned to Mr. Lucero and Mr. Lucero tells me, 'Give the money to Willie.' Mr. Maestas had been introduced to me as Willie and in turn Mr. Lucero was introduced as Carlos. So, I told him no. I said, 'The money is going to go with me until we see the stuff.' So we finally get out of the booth. Mr. Lucero and I were leaving the tavern and he turned around and he said, 'Did you give the money to Willie?' I says no. He says, 'All right, come on' so we left the tavern. We left Mr. Muniz and Mr. Maestas inside the tavern and also the three

agents remained there. We get into the Government vehicle, which is the 1955 Buick. We drove to Colorado Springs and Mr. Lucero directed me to drive across Nevada two blocks on Taylor and to turn one block north, this being the intersection of Taylor and Tejon Streets in Colorado Springs. . . ." (R. 16)

Thereafter a transfer of contraband and money was effected between Lucero and Agent Wolski.

Maestas was charged with three counts of fraudulently, knowingly and wilfully to receive, conceal, sell and facilitate the transportation and concealment of heroin. He was not charged with conspiracy. Although there was no possession, actual or constructive proven concerning petitioner the Court instructed the jury as follows:

"'Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

You will recall from what I have had to say to you in reading the statute that this statute contains this language: 'Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

Now, of course, before this statutory presumption can become effective, it must be established by the

evidence beyond a reasonable doubt that the defendant knowingly and fraudulently had the heroin described in the information in his possession." (R. 76)

The Federal District Court of Colorado ordered a judgment of acquittal as to count three and the jury convicted Maestas of two counts. (R. 3; 4) Maestas was sentenced to 8 years imprisonment. (R. 7, 8)

On appeal the Tenth Circuit Court of Appeals reversed the second count unanimously and affirmed the conviction of the first count by a 2-1 decision. (Appendix B, *infra*, p. 16)

The majority opinion did not follow *Glover v. U.S.*, 306 F. 2d 594 (10th Cir. 1962) in its own circuit nor the law in the 2nd Circuit, *Jones v. U.S.*, 308 F. 2d 26 (2nd Cir. 1962) nor the law in the 9th Circuit, *Hernandez v. U.S.*, 300 F. 2d 114 (9th Cir. 1962) (Appendix B, *infra*, p. 14). The minority opinion urged following the Court's prior decision and those of the other circuits. (Appendix B, *infra*, p. 16)

REASONS FOR GRANTING THE WRIT

1. *There is a conflict between the Circuits.* The majority opinion below is in conflict with the *en banc* decision of the Second Circuit Court of Appeals in *Jones v. U.S.*, 308 F. 2d 26 (2nd Cir. 1962) and with the Ninth Circuit Court of Appeals in *Hernandez v. U.S.*, 300 F. 2d 114 (9th Cir. 1962).

The Second Circuit first considered the question of imputed constructive possession in *U.S. v. Santore*, 290 F. 2d 51 (2d Cir. 1960) but the court was evenly divided. Thereafter *Jones v. U.S.*, 308 F. 2nd 26 (2nd Cir. 1962) was decided.

The critical point of the *Jones* and *Hernandez* decisions relates to a vital question of criminal law. These cases affirmed the importance of establishing guilty knowledge, or *mens rea*, as a prerequisite to criminal responsibility. In dealing with 21 U.S.C. §174 we encounter a statute which creates a double presumption, illegal importation and knowledge thereof, once possession of narcotics is established. *Jones* and *Hernandez* refused to allow a third presumption to be imparted by requiring that an accused have physical possession or constructive possession independent of any inferred relationship with another. That is, constructive possession may be based on another's actual possession only where the actual possessor has a legally relevant relationship, such as co-conspirator or aider and abettor, with the accused. To impute possession in any other fashion is to create the abhored "guilt by association," as was done here, and raise important questions for this court in its supervisory power over federal criminal justice.

A different division of the Tenth Circuit has taken a contrary course in *Glover v. U.S.*, 306 F.2d 594 (10th Cir. 1962) than the case at bar. It held that "guilt may not be inferred by mere association." Therefore, if this Honorable Court does not feel that the Writ is ripe we would respectfully ask for an order requiring an *en banc* hearing in the 10th Circuit to resolve the intramural conflict.

2. *The decision below manifests a dangerous erosion of important principles in criminal responsibility in the federal system of criminal justice.* The instant case represents what Justice Murphy characterized as the "dragnet theory of criminal justice." *Nye and Nissen v. United*

States, 336 U.S. 613 (1948) (dissenting opinion). The government manifests an inclination to seek conviction of those at the outer fringes of criminal conduct who cannot be proved to be aiding and abetting or conspiring with those directly engaged in criminal conduct. Criminal responsibility traditionally rests on a concurrence of a guilty mind with prohibited conduct resulting in a proscribed harm. The government is bound to prove a legally proscribed relationship before imputing criminal conduct and this they did not do.

The presumption of innocence is not a jingle to be invoked when convenient. It is a requirement that the government prove criminal conduct beyond a reasonable doubt. While it is true that this court cannot correct all the errors that even learned jurists will make, it is also true that when an error represents an erosion of an important principle in federal criminal justice this court will correct the deviation.

The recent cases of *Morissette v. United States*, 342 U.S. 246 (1951) and *Smith v. People*, 361 U.S. 147 (1959) represent a significant effort by this court to halt the expansion of non-*mens rea* type offenses. The instant case represents a significant departure from the teaching of *Morissette* and *Smith*. There can be no requirement of a guilty mind when a conviction of unlawful possession can stand where the accused has no actual possession, no legally proscribed relationship with a co-defendant with actual possession and no proven ability to control the other's conduct. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494 (1950).

The possession anomoly here is further complicated by an important constitutional factor. The statute, 21 U.S.C. §174 states, in substance, that once possession is established this is sufficient evidence to authorize conviction unless the defendant satisfactorily explains such possession. This would seem to compel an accused to take the stand and explain his conduct in direct contravention of the self-incrimination clause of the Fifth Amendment of the Constitution of the United States. The problem is particularly acute when, as here, the accused has the vaguest possible connection with the contraband and is, in effect, obliged to explain the possession of another.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted or an order be entered directing the Tenth Circuit to rehear the case below *en banc*.

Respectfully submitted,

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Counsel for Petitioner

January 14, 1963.

Appendix A

70 Stat. 570, 21 U.S.C. 1958 ed., §174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

65 Stat. 717, 18 U.S.C. 1958 ed., §2 Principals:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Appendix B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 7039 and 7040 — November Term, 1962

Andrew Lucero,
Appellant,
v.
United States of America,
Appellee.

Frank E. Maestas,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado

Filed United States Court of Appeals, Tenth Circuit November 30, 1962. Robert B. Cartwright, Clerk.

Walter L. Gerash for Appellants.

Michael C. Villano, Assistant United States Attorney (Lawrence M. Henry, United States Attorney, was with him on the brief) for Appellee.

Before Lewis, Breitenstein and Seth, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellants Lucero and Maestas were charged and tried jointly under a 3-count information for violations of 21 U.S.C. §174, the counts differing only in the dates and the quantities of heroin. The trial court sustained Maestas' motion for judgment of acquittal on Count 3. The jury found Lucero guilty on all counts and Maestas guilty on Counts 1 and 2.

Lucero's claim of entrapment is without merit. The record shows no luring of an innocent person into the commission of a crime but rather the offer by a federal agent of an opportunity to one who has the intent to commit a crime. In such circumstances there is no argument.[1]

Both Lucero and Maestas attack the constitutionality of §174 but the issue has been consistently resolved against them both by this circuit and by the Supreme Court.[2]

Maestas presents a serious problem of the sufficiency of the evidence. Section 174 proscribes certain dealings in unlawfully imported narcotic drugs by a person knowing of the unlawful importation and provides that proof of possession "shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." The record shows no actual possession of heroin by Maestas and the information contains no conspiracy charge. To sustain the conviction of Maestas the government contends that he had constructive possession and that he is guilty as an aider and abettor within the purview of 18 U.S.C. §2.

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[1] Sandoval v. United States, 10 Cir., 285 F.2d 605, 607.

[2] See Griego v. United States, 10 Cir., 298 F.2d 845, 848, and cases there cited.

The conviction on the first count depends on the testimony of federal agent Wolski who, after relating that through the introduction of a third party he had met Lucero and Maestas in a Colorado Springs tavern, testified thus:

> "My conversation started with Mr. Maestas, who was sitting across from me and I asked him how much a half ounce of heroin would cost me. He said $250. I asked him the quality and he told me that this heroin could be cut down the middle. Cutting down the middle means to double it. I took out $300 out of my pocket, counted out $250, putting the remaining $50 back in my pocket and asked Mr. Maestas if the deal was to go down here in the booth. He says, 'No, not here,' and he turned to Mr. Lucero and talked in Spanish. Then I directed my conversation to Mr. Lucero and Mr. Lucero tells me, 'Give the money to Willie.' Mr. Maestas had been introduced to me as Willie and in turn Mr. Lucero was introduced to me as Carlos. So, I told him no. I said, 'The money is going to go with me until we see the stuff.' So we finally got out of the booth. Mr. Lucero and I were leaving the tavern and he turned around and he said, 'Did you give the money to Willie?' I says no. He says, 'All right, come on,' so we left the tavern."

Shortly thereafter Lucero delivered a package containing heroin to the agent. No evidence was offered by the defendants.

The questions arising over the construction and application of 1174 in cases where an agent has dealt with two persons, only one of whom had actual possession of the

narcotics, have been discussed comprehensively in the recent cases of United States v. Jones, 2 Cir., 308 F.2d 26, and Hernandez v. United States, 9 Cir., 300 F.2d 114. Any review which we might make of the precedents there considered would have only cumulative value.

Section 174 provides that proof of possession is sufficient evidence to authorize conviction unless that possession is explained to the satisfaction of the jury. This provision eliminates the necessity of proof by the prosecution that the heroin was unlawfully imported and that the accused had knowledge of such unlawful importation. Constructive possession is enough to bring the statutory provision into play[2] even when established by circumstantial evidence.[4]

In the prosecution of an aider and abettor the government may not rely on the statutory provision unless the aider and abettor is shown to have had actual or constructive possession.[5] Otherwise, an aider and abettor would be required to explain away not his possession but the possession of another.[6]

The issue is whether Maestas had constructive possession. The evidence on Count 1 shows that Maestas was the moving party, that he vouched for the quality of the heroin, and that he set the price. Actual delivery was made by Lucero after Maestas had talked to Lucero in Spanish. The evidence shows more than mere participa-

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[2] United States v. Santore, 2 Cir., 290 F.2d 51, 76, certiorari denied 36 U.S. 834, 356 U.S. 835; Cellino v. United States, 9 Cir., 276 F.2d 941, 946.

[4] Gallegos v. United States, 10 Cir., 237 F.2d 694, 698. Cf. Sadler v. United States, 10 Cir., 303 F.2d 664, 665.

[5] United States v. Jones, 2 Cir., 308 F.2d 26, 31.

[6] Ibid. p. 33.

tion in a narcotics transaction.[7] The inference that Maestas had control over, and was able to assure delivery of, the heroin is reasonable. He may not escape the consequences of his conduct by avoiding actual contact with the contraband drug.

While we hold the evidence sufficient to sustain the conviction of Maestas on Count 1, we reach a contrary conclusion on Count 2. During the Count 1 transaction the agent gave Lucero his Denver phone number. About three weeks later Lucero called the agent and arranged a meeting at a Denver cocktail lounge. When the agent arrived there, he saw Maestas sitting in a car nearby. He approached Maestas who told him Lucero was in the lounge. Later Lucero and the agent walked to a spot several blocks away where Lucero delivered heroin to the agent. While they were returning to the lounge, Maestas drove by and talked to Lucero in Spanish. Soon thereafter Lucero left the agent and entered the car driven by Maestas.

In this episode Maestas made none of the arrangements, was not moving party, and did nothing from which constructive possession may be inferred. He was in the vicinity and drove Lucero away after the transaction was completed. We have recently held that suspicion of guilt is not enough to sustain a conviction and that guilt may not be inferred from mere association.[8] As the information contained no conspiracy count we are not called on to de-

[7] Cf. United States v. Hernandez, 2 Cir., 290 F.2d 86, 90, in which the court said: "* * * a person who is sufficiently associated with the persons having physical custody so that he is able, without difficulty, to cause the drug to be produced for a customer can also be found by a jury to have dominion and control over the drug, and therefore possession."

[8] Glover v. United States, 10 Cir., 206 F.2d 594, 595.

cide whether possession by one conspirator is attributable to all.

The claim of error in the instructions is without merit as no objections to the instructions were interposed in the trial court.[9] An examination of the instructions discloses no plain error affecting substantial rights.

The judgment against Lucero is affirmed on all counts. The judgment against Maestas is affirmed on Count 1 and reversed on Count 2.

SETH, Circuit Judge, dissenting as to defendant Maestas:

I dissent on the ground that the conviction of Maestas was based upon the statutory presumptions which can only arise from possession of narcotics, and such possession was not established. This conclusion is reached reluctantly and with full appreciation for the serious nature of the charges, and the revulsion we all have for traffic in narcotics, and for all those in any way associated with such activities.

The meaning of the word "possession" in the statute and as it has been construed by other courts requires a much stronger showing of dominion and control by Maestas than was made in this case. Under 21 U.S.C., §174, it is of course required that the heroin be imported into the United States illegally and that the defendant have knowledge that it was so imported. Provision is also made that if it be shown the defendant had possession of the narcotics, such possession shall be sufficient for conviction

[9] Rule 30, F.R.Crim.P.; Burns v. United States, 10 Cir., 286 F.2d 152, 157.

unless it is satisfactorily explained to the jury. There is no evidence of any knowledge as to the importation; consequently reliance is placed by the government on the statutory presumptions arising from possession. Necessarily before these presumptions arise, a showing must be made that the defendant either had constructive or actual possession of the heroin. The only basis to support the conviction of Maestas was that he was an aider and abettor. The same elements of the offense must be proved as to an aider and abettor as any principal, and it must be proved that he shared the criminal intent of a principal. Johnson v. United States, 195 F.2d 673 (8th Cir.); Hernandez v. United States, 300 F.2d 114 (9th Cir.). In the absence of any evidence of knowledge of unlawful importation, it must be shown that the aider and abettor had "possession" of the drug. Also in the absence of a satisfactory explanation, this possession is sufficient evidence to authorize conviction (21 U.S.C., §174). How may possession in the aider and abettor Maestas be shown to support a conviction in the absence of his actual or physical possession? The only contention that can be made by the government is that Maestas had constructive possession or possession was somehow imputed to him by the actual possession shown to have been in his co-defendant. There was no charge of conspiracy.

To constitute constructive possession, the party charged must have the drug in his control or under his dominion. Rodella v. United States, 286 F.2d 306 (9th Cir.). Thus if the evidence shows that Maestas was able to control the drug or cause it to be produced, he would have constructive possession although a third person might have physical possession, Rodella v. United States, supra, but this was not shown. This control or dominion could

be shared with others and not destroy the constructive possession, Gallegos v. United States, 237 F.2d 694 (10th Cir.), and further such constructive possession may be established by circumstantial evidence, Hernandez v. United States, supra, but again this was not shown. The actual relationship or connection between the co-defendants Maestas and Lucero was not established; an inference can be easily drawn that there was some connection between them. However, the most that was shown as to Maestas on count one was that he and Lucero were together in a tavern when the agent arrived, that they talked to the agent together, that Maestas told the agent the price of heroin, the quality, and that the deal could not be made in the tavern. Lucero told the agent to pay Maestas but the agent refused until he saw the "stuff." Lucero and the agent left the tavern and Lucero later delivered the drugs and took the money. As to count two, Maestas was shown to be in the vicinity, knew Lucero was in a nearby cocktail lounge, indicated everything was all right, and after the sale by Lucero, out of Maestas' presence, had some conversation with Lucero and left with him (Lucero here again made the delivery and received the money). There is no evidence that Maestas had such dominion or control over the drugs that he could cause them to be produced through or by Lucero or anyone else, nor did he arrange the sale. Further there was no evidence that Lucero and Maestas jointly had control or dominion. The evidence does demonstrate that Lucero could and did produce the drugs for each sale and was paid. It must be concluded that Maestas did not have constructive possession of the drugs within the meaning of 21 U.S.C., §174.

Since Maestas did not have constructive possession

but his co-defendant Lucero had actual possession, may this be imputed to Maestas? No conspiracy was charged and there was no proof of any other type of joint undertaking whereby Maestas was shown to have dominion or control over the drug solely or jointly with Lucero or others. The control is the ultimate test and the legal tag on the relationship between these co-defendants is not particularly helpful. The court in Hernandez v. United States, supra, said:

> "We are convinced, on the other hand, that an interpretation of the term 'possession' in Section 174, which would include the possession of a third person, not on trial, with whom defendant has entered into a common scheme or plan or whom he has aided or abetted, but whose possession of narcotic drugs he has neither shared nor controlled, would be inconsistent with the language, the structure, and the purposes of the statute."

The court then said:

> "As we have seen, a definition of 'possession' in terms of dominion and control is amply supported by authority; constructive possession is as much a form of legal possession as is physical custody. But 'possession' of a third person 'imputed' to the defendant is not, in legal terminology, 'possession' of the person to whom it is attributed at all. It is instead the physical or constructive possession of another, for which the defendant is to be made liable. Thus the use of the phrase 'imputed possession' begs the question at issue, which is precisely whether the defendant is to be made liable for the possession of the third person in the circumstances of this case."

Thus there is no basis to impute the possession of Lucero to Maestas by reason of some association between them which the proof does not disclose.

The Second Circuit considered this general problem in United States v. Santore, 290 F.2d 51 (2d Cir.), but the court was evenly divided. Later in Jones v. United States, Docket No. 27157, August 17, 1962, 31 U.S.L.Week 2120, the problem was again considered by the same court en banc. The facts briefly were that the agent met Jones who took him to a person named Charlie. Jones in the absence of the agent talked to Charlie and then told the agent he would be able to get the heroin at $150.00 an ounce. Shortly thereafter in the presence of Jones, Charlie handed the heroin to the agent and received the money. Charlie then told the agent to deal with him and not anyone else. The court held that Jones did not have possession, and said:

> "Nothing in the record indicates that Jones had any independent control over the narcotics, or over Moore, or that he was able to assure to Brown that he could produce narcotics. And, unless we are to read the statutory phrase 'possession of the narcotic drug' to mean merely 'participation in a transaction involving the narcotic drug' we cannot rely on constructive possession here to affirm the conviction below."

The fact of the *Jones* case at bar may be somewhat stronger than *Maestas* but not sufficiently so to bring about a different result nor to make the reasoning less applicable.

This court has recently considered a similar situation arising from the association of several persons charged

with narcotic violations in Glover v. United States, No. 6833 (10th Cir.), not yet reported, and held that the proof as to participation by Glover was not sufficient. There the facts as to Glover's participation are quite similar to the case at bar.

The evidence did not show possession in Maestas either directly or by circumstantial evidence, and I would reverse as to Maestas.

Appendix C

EXHIBIT "A"

JUDGMENT

Seventeenth Day, November Term, Friday, November 30th, 1962.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed as to count I and reversed as to count 2.

It is further ordered by this court that Frank E. Maestas, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Order denying petition for rehearing en banc Thirty-Second Day, November Term, Friday, December 21st, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the application of appellant for a rehearing en banc and was submitted to the court.

On consideration whereof, it is now here ordered that the said application be and the same is hereby denied.

Order Denying Petition for Rehearing

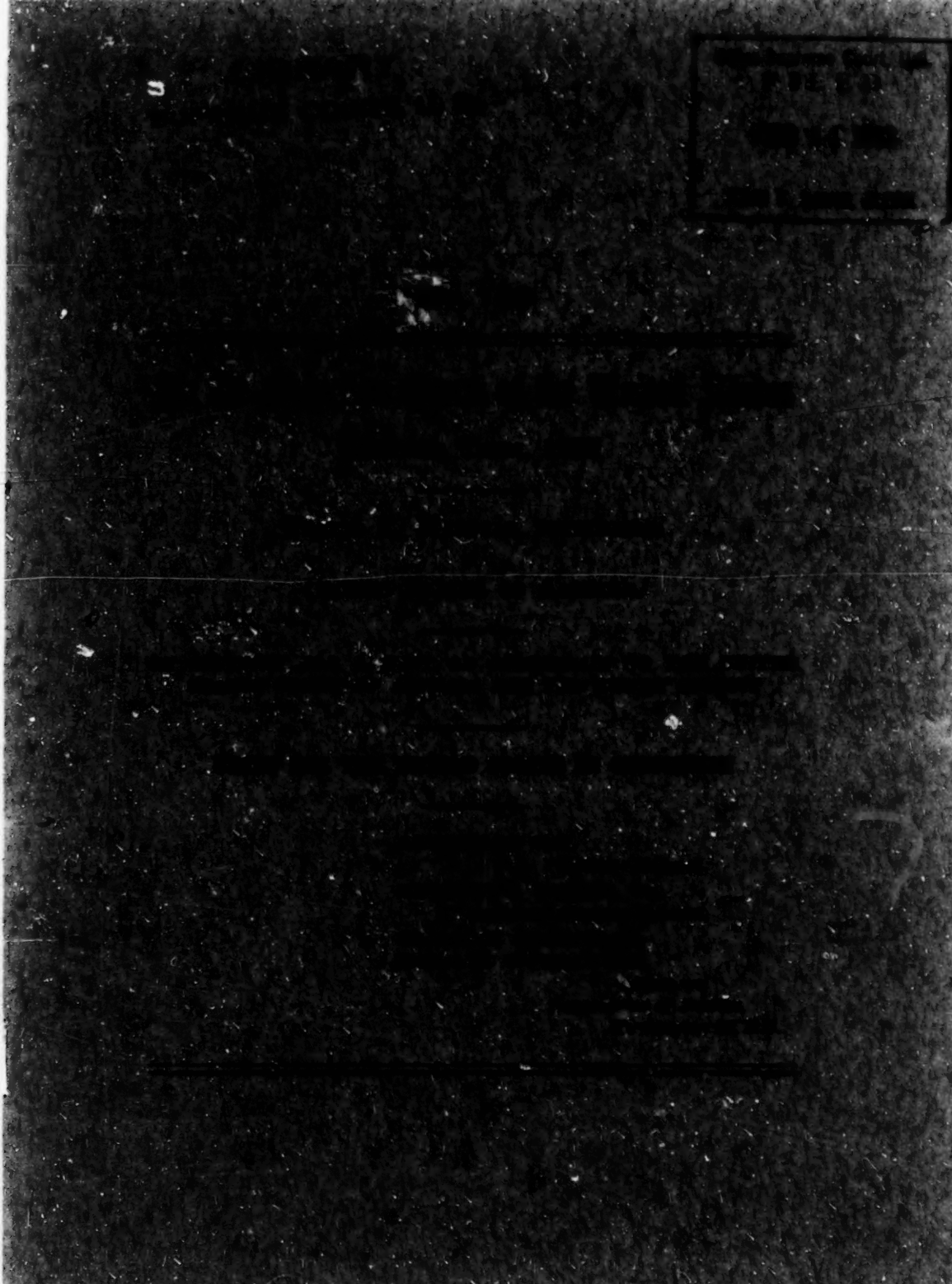
Thirty-Second Day, November Term, Friday, December 21st, 1962.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

By order of December 27, 1962, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.



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21 U.S.C. 174	2, 3, 4, 5, 6

675213—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 759

FRANK E. MAESTAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 3–17; Pet. App. 11–21) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1962 (Vol. II, 3, 18; Pet. App. 11, 22). A petition for rehearing was denied on December 21, 1962 (Vol. II, 23; Pet. App. 22–23). The petition for a writ of certiorari was filed on January

[1] The record consists of two separately paginated volumes. Volume I contains the trial transcript and related proceedings and is referred to as "Tr."

18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence of petitioner's possession of narcotics was sufficient to justify reliance on the presumption erected by 21 U.S.C. 174.

STATUTE INVOLVED

Section 174 of Title 21 U.S.C. provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * * shall be imprisoned not less than five or more than twenty years * * *.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> * * * * *

STATEMENT

After a trial by jury in the United States District Court for the District of Colorado, petitioner and co-defendant Andrew Lucero were convicted of having unlawfully received and sold narcotic drugs with

knowledge that the drugs had been imported into the United States contrary to law, in violation of 21 U.S.C. 174, *supra* (Tr. 1–2, 3, 6–7, 8). Petitioner was sentenced to imprisonment for eight years on each of the two counts,[2] the sentences to run concurrently (Tr. 8). The court of appeals affirmed petitioner's conviction on count one, one judge dissenting, and reversed his conviction on the second count (Vol. II, 3–17, 18; Pet. App. 11–21, 22).

The facts relating to petitioner's conviction on count one may be summarized as follows:

At about 8:00 p.m. on March 22, 1961, Narcotic Agent Chester Wolski and an informer for the Denver Police Department drove up to a service station in Colorado Springs, Colorado, where the informer placed a telephone call. (Tr. 14–15). Shortly thereafter, Wolski and the informer entered a tavern and seated themselves in a booth. Petitioner and Lucero arrived a few minutes later and seated themselves at the same booth (Tr. 15, 33). The informer introduced Wolski to the two men, and a general conversation ensued. Wolski then broached the subject of narcotics with petitioner. When Wolski asked how much a half ounce of heroin would cost, petitioner replied the price would be $250. He said it could be "cut down the middle," indicating the quality of the narcotics was such that it might be diluted to double

[2] The information (an indictment having been waived) charged the petitioner and Lucero each with three sales of narcotics (Tr. 1–2). Lucero was convicted on all counts (Tr. 3, 6–7). The trial judge dismissed count three as to the petitioner, and petitioner was convicted on the remaining counts (Tr. 3–4, 8).

the quantity. Wolski took out the money and asked whether the deal would take place there. Petitioner said "not here" and then talked to Lucero in Spanish. Lucero told the agent to give the money to petitioner but the agent refused to do so until he had the narcotics (Tr. 16, 28). Wolski and Lucero then left the tavern and entered an automobile which was parked nearby. On directions from Lucero, Wolski drove to a certain intersection and stopped. Lucero got out of the automobile, walked over to a gutter and picked up a package which he handed to Wolski in exchange for the money. On subsequent analysis, the package was found to contain heroin (Tr. 17, 51–52).

In its instructions to the jury, the court explained the nature of the charges and read 21 U.S.C. 174 (Tr. 74, 75–76). It charged (Tr. 76, 77):

> Now, of course, before this statutory presumption can become effective, it must be established by the evidence beyond a reasonable doubt that the defendant knowingly and fraudulently had the heroin described in the information in his possession.
>
> * * * * *
>
> As used in this statute and as I have used it in discussing this matter with you, the word "possession" means a physical control with intent to exercise control, with knowledge of the presence and character of the narcotic existing prior to the exercise of such control.
>
> Physical control is not limited to the actual physical handling of the narcotic, but it extends to any situation wherein the defendant had the right and the power to control the narcotic to

> the exclusion of others, wherever it might be situated.
>
> In other words, the term "possession" means actual possession by the accused, not necessarily in his hand, of course, but under the control and dominion. So, if you find beyond a reasonable doubt that the defendant so had possession knowingly and fraudulently of the heroin described in the information or any substantial part of the amount described in each respective count of the information, then, of course, you will be warranted in giving effect to the statutory presumption that I have just read to you, and you may find the defendant guilty as charged in that particular count of the information.

The court charged that one who aids and abets another in the commission of a crime against the United States is a principal to the crime and may be tried and convicted as though he were the actual perpetrator of that offense; and that if the jury found that the crime charged in count one had been committed by some person or persons other than the petitioner, but that the petitioner had aided or abetted its commission, the jury would be warranted in finding the petitioner guilty of that offense (Tr. 78–79). No exception was taken to the court's instructions.

ARGUMENT

Contrary to petitioner's assumption (Pet. 2, 6), this case does *not* present the question whether the presumption erected by 21 U.S.C. 174 applies to a mere associate in the transaction who did not himself possess or control the narcotics. For present purposes, we may assume with the court below (Pet.

14) that the presumption is inapplicable to a co-defendant who has neither actual nor constructive possession. On the other hand, all of the decisions recognize that exclusive physical custody is not required to invoke the statute, but that dominion and control, though shared with others, is sufficient, and that ability to cause the drug to be produced by someone else amounts to constructive possesion. *United States* v. *Jones,* 308 F. 2d 26, 30–31 (C.A. 2); *Hernandez* v. *United States,* 300 F. 2d 114, 117 (C.A. 9); *United States* v. *Hernandez,* 290 F. 2d 86, 90 (C.A. 2); *United States* v. *Santore,* 290 F. 2d 51, 76 (C.A. 2), certiorari denied, 365 U.S. 834; *Rodella* v. *United States,* 286 F. 2d 306 (C.A. 9), certiorari denied, 365 U.S. 889; *Cellino* v. *United States,* 276 F. 2d 941, 945 (C.A. 9); *United States* v. *Malfi,* 264 F. 2d 147, 150 (C.A. 3), certiorari denied, 361 U.S. 817; *United States* v. *Maroy,* 248 F. 2d 663, 666 (C.A. 7). That is the theory of this case. There is accordingly no conflict of principle between the instant decision and *Hernandez* (C.A. 9) or *Jones* (C.A. 2). Nor do the majority and dissenting opinions below disagree as to the applicable rule. Compare Pet. 14–15 and Pet. 17–18. The only question here is whether the evidence *in this case* was sufficient to establish the requisite constructive possession on the part of petitioner.[3]

[3] It is too late in the day to suggest (Pet. 8) that the presumption flowing from possession under Section 174 contravenes the Fifth Amendment. See *e.g.*, *Casey* v. *United States,* 276 U.S. 413, 418; *Yee Hem* v. *United States,* 268 U.S. 178, 182. See also our brief in opposition to the petition for certiorari in *Jennings* v. *United States,* No. 840 Misc., this Term.

The facts already recited support the conclusion that petitioner controlled the narcotics and the actual sale. He set the price, vouched for the quality of the drug, and determined where the transaction would be consummated. There is at least a permissible inference that petitioner's conversation with Lucero in Spanish was an instruction directing the conditions of the transfer, and perhaps revealing the hiding place of the narcotics. In short, petitioner was clearly the dominant party in the transaction, apparently dictating every move. While he did not actually soil his hands, it is plain he had effective possession of the drug.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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